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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 524

HARRY STEIN, TRADING AS JEAN CHEMICAL COMPANY, AND NATIONAL UNION INDEMNITY COMPANY, PETITIONER[1]

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 40–42) and its opinion on motion for amended findings of fact and for a new trial (R. 43–45) are unreported. The opinion of the Circuit Court of Appeals (R. 49–51) is reported in 119 F. (2d) 677.

[1] The petition for a writ of certiorari purports (p. 1) to be that of "Harry Stein, trading as Jean Chemical Company, and National Union Indemnity Company, a corporation." However, the record indicates that an interlocutory judgment by default was taken against Stein (R. 15, 40) and that only the National Union Indemnity Company appealed from the final judgment (R. 15–16). By "petitioner" as used hereinafter, we refer to the National Union Indemnity Company alone.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 2, 1941 (R. 52). A motion for rehearing was denied May 19, 1941 (R. 54). The petition for a writ of certiorari was filed August 19, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1935.

QUESTIONS PRESENTED

1. Whether the evidence supports the findings that petitioner's principal, who had obtained specially denatured alcohol tax-free, unlawfully diverted it.

2. Whether the suit is one to recover for breach of the condition of the bond given by petitioner as surety, or is a suit to recover taxes guaranteed by the bond.

STATUTES AND REGULATIONS INVOLVED

The pertinent portions of the applicable statutes and regulations are set out in the Appendix, *infra,* pp. 10–18.

STATEMENT

On or about June 12, 1928, Harry Stein, doing business as Jean Chemical Company, pursuant to the National Prohibition Act (Tit. II, Secs. 4, 6, Tit. III, Sec. 13, Appendix, *infra,* pp. 10–15), secured a permit to withdraw and use specially denatured alcohol in the manufacture of certain toilet preparations (R. 23–24, 40). In order to

obtain the permit, Stein and the petitioner herein, National Union Indemnity Company, as surety, had theretofore executed a bond in the sum of $6,000 and in the form (Form 1480) specified by Treasury Regulations 3 (Revised August, 1927, Art. 112, Appendix, *infra,* pp. 17–18) issued pursuant to the Act. The condition of the bond was as follows (R. 40–41):

> Now, Therefore, the condition of this obligation is such that if there be no material false statement in the application for such permit, and the said principal shall not violate the terms of such permit, and shall transport, store, and use such denatured alcohol in accordance with the law and regulations made pursuant thereto, and shall in all respects fully and faithfully comply with all provisions of law now or hereafter enacted and all regulations promulgated thereunder respecting such transportation, storage, and use, and shall pay for all such denatured alcohol illegally or unlawfully diverted, lost, or unaccounted for in violation of such permit and law and regulations at the rate of $2 per wine gallon, and in addition thereto shall pay all penalties and fines imposed, then this obligation to be void; otherwise to remain in full force and virtue.

On or about November 8, 1928, Stein's permit was revoked by the Federal Prohibition Administrator (R. 17, 24). This action was sustained on review. *Stein* v. *Doran,* 46 F. (2d) 738 (C. C. A. 3d).

Thereafter, on September 25, 1935, the United States instituted the present suit by filing a statement of claim against Stein and the petitioner (R. 16–21). The statement alleged that between June 4, 1928, and August 4, 1928, Stein had illegally diverted and failed to account for 4,472 wine gallons of alcohol withdrawn tax-free under the permit. It set forth two causes of action, the first for damages at the rate of $2.00 per wine gallon for breach of the condition of the bond (R. 17–19), and the second for damages in the amount of the basic tax of $2.09 per wine gallon (R. 19–21). An interlocutory judgment by default was taken against Stein (R. 15, 40). The case against the petitioner surety was tried without a jury and, pursuant to stipulation, the transcript of testimony in the revocation proceeding was received in evidence (R. 29, 40).

The District Court found, in substance, as follows:

In June and July 1938 Stein manufactured and sold three batches of "Apple Blossom Toilet Water" and "Lilac Toilet Water," using in his manufacture 4,472 gallons of specially denatured alcohol withdrawn under his permit (R. 41). The toilet waters were not made in accordance with the prescribed Government formula and regulations in that they did not contain apple blossom oil or lilac oil, but were made, as intended by Stein, in such manner as to enable them to be turned into drinkable alcohol by a simple process (R. 41–42, 43–44). Each of the three batches was sold in bulk to a

single customer and the sales were not such as were ordinarily made in the course of business (R. 41). Two of the three customers had reputations of being "cover-up houses" (R. 41). Stein's purpose and intent in obtaining the denatured alcohol and in manufacturing and selling his product was to the contemplated end that after his product had passed into the hands of purchasers it would be "cleaned" of denaturants and other ingredients and ultimately be used for beverage purposes (R. 41–42). In such illegal use Stein knowingly cooperated by the conduct above recited (R. 42).

Upon the basis of these facts the District Court concluded that Stein's manufacture and sale of the toilet waters constituted an unlawful diversion of the alcohol and a breach of the condition of the bond (R. 42). It also concluded that recovery on the bond was not barred by the statute of limitations applicable to collections of penalties and forfeitures (R. 42). Judgment was rendered for the United States against Stein and the petitioner in the sum of $7,980, which was the amount of the bond plus interest (R. 47). Petitioner's motion for amended findings of fact and a new trial was denied (R. 43–45). On appeal by petitioner the court below affirmed the judgment (R. 52). A petition for rehearing was denied May 19, 1941 (R. 54).

ARGUMENT

The decision of the court below is not alleged to be in conflict with that of any other court and it

is in accord with that of the Circuit Court of Appeals for the Second Circuit upon analogous facts in *United States* v. *Bornn*, 104 F. (2d) 641, where this Court denied certiorari. *Bornn* v. *United States*, 308 U. S. 606; *Royal Indemnity Co.* v. *United States*, 308 U. S. 606. No question of general importance is presented. The case merely involves the liability of a surety upon a bond and the questions of law raised by petitioner do not call for further review.[2]

1. Petitioner contends (Pet. 4, Br. 10) that the evidence fails to show that Stein illegally diverted any of the denatured alcohol withdrawn under his permit. However, there was testimony directly supporting the findings of the District Court as to Stein's failure to use apple blossom or lilac oil (Tr. 45, 64, 81, 83–84, 86), as to the effect of such failure in rendering the toilet water capable of being made potable (Tr. 66–67, 84–85), as to the manner in which Stein sold his product (Tr. 97, 182–184), and as to the reputations which two of his purchasers had as "cover-up houses" (Tr. 99, 103–104, 108).[3] In addition, there was proof that Stein made no inquiries as to what his purchasers intended to do with his product, and that subse-

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[2] The petition contains no specification of the reasons relied on for allowance of the writ.

[3] The references "Tr." are to the typewritten transcript of the testimony in the revocation proceeding which was received in evidence in the instant case pursuant to stipulation (R. 29) and which is on file in the Court, although only in part included in the printed record, as stipulated (R. 55–56).

quently they refused to disclose to Government inspectors what they had done with it (Tr. 94, 98, 191). The reasonable inferences from all of this evidence warranted the District Court in its findings with respect to Stein's purpose and intent and the court below upheld the findings as being "amply supported by the record" (R. 51).

That Stein's activities, so found, constituted an unlawful diversion and hence a breach of the condition of the bond seems clear. *United States* v. *Bornn, supra; United States* v. *Van Schaak Bros. Chemical Works,* 33 F. Supp. 822 (D. C. N. D. Ill.). See *Various Items* v. *United States,* 282 U. S. 577, 580. Section 4 of Title II of the National Prohibition Act (Appendix, *infra,* pp. 10–12) made it illegal for any person knowingly to sell toilet preparations for beverage purposes or to sell them "under circumstances from which the seller might reasonably deduce the intention of the purchaser to use them for such purposes," and Section 3 specified that all the provisions of the Act should be construed liberally so as to prevent the use of intoxicating liquor as a beverage.

2. Petitioner also contends (Pet. 5, Br. 11, 13) that the suit is, in reality, one for the collection of taxes guaranteed by the bond, that the establishment of liability for taxes and of damages to the Government is a prerequisite of recovery, and that the suit is barred by the statute of limitations applicable to tax suits.

These contentions are without merit. Although the statement of claim alleged two causes of action, the second of which was for damages computed according to the basic tax rate, only the first cause of action, which was for recovery upon the bond, was sustained by the District Court and the court below. This is clear from their opinions, both of which followed the *Bornn* case where the Second Circuit granted recovery upon the bond (Form 1480), although holding that there was no liability for taxes. The condition of the bond required payment of the definite sum of $2 per wine gallon for each gallon illegally diverted irrespective of tax liability or of other damage to the Government, and, as said in the *Bornn* case, "there is no reason why the defendants should not be required to do what they agreed to do." 104 F. (2d) at 645. See also *United States* v. *Frost,* 80 F. (2d) 341, 343 (C. C. A. 5).[4]

Since the suit is one for recovery upon the bond, the statute of limitations governing the collection of taxes is inapplicable. *United States* v. *John*

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[4] In *United States* v. *Zerbey*, 271 U. S. 332, cited by petitioner for the proposition that proof of damages is necessary (Br. 11), the bond was a general compliance bond which did not require the payment of any definite amount such as the $2 per gallon specified in the bond herein. Cf. *Clark* v. *Barnard*, 108 U. S. 436; *United States* v. *Dieckerhoff*, 202 U. S. 302. Even assuming that proof of damages was necessary in the instant case, the decision below is correct, since 4,472 gallons at the rate of $2 per gallon exceeds the amount of the bond.

Barth Co., 279 U. S. 370, 375; *United States* v. *Frost, supra.* Nor is the suit barred by laches or by any other statute of limitations. *United States* v. *Mack*, 295 U. S. 480; *United States* v. *Borun, supra.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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